Supreme Court, U.S.
FILED
APR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1504 (8)

In The
Supreme Court of the United States
October Term, 1985

MARITIME OVERSEAS CORPORATION,

and

SECOND SHIPMOR ASSOCIATES,

Petitioners,

vs.

WALTER R. BRUNNER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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26 pp

LIST OF PARTIES

A. Those parties listed in the caption of the case.

B. The following parties may have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Walter R. Brunner
2. Maritime Overseas Corporation
3. Second Shipmor Associates
4. Assuranceforenigen GARD
5. The firm of KIERR, GAINSBURGH, BENJAMIN, FALLON & LEWIS
6. The firm of TERRIBERRY, CARROLL & YANCEY
7. The firm of BAKER, GARBER, DUFFY & BAKER
8. The firm of FREEDMAN, CRISPINO, HELWEIL & MAY
9. Robert K. Marzik

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SUMMARY OF ARGUMENT

The defendants in this case accepted without any objection a jury charge which explicitly instructed that the plaintiff had two separate theories of recovery which each had to be separately considered and evaluated by the jury. (The jury charge has been reproduced in its entirety as Appendix I to this Brief.) How then can they complain when the Jury did as they were told! If the defendants believed that the factual circumstances of this case required that only one theory of recovery go to the jury or that the two theories had to rise or fall together, it was their obligation to make this point to the Trial Court, and make a timely objection to the jury charges given. The jury's findings that the defendant was negligent but that the vessel was not unseaworthy are consistent with the instruction given and are not irreconcilably in conflict. The decision of the Fifth Circuit Court of Appeals affirming the judgment below should not be disturbed.

———o———

ARGUMENT

In this simple and straightforward seaman's case the defendants seek a reversal of the jury's verdict in favor of the plaintiff because the jury found the vessel owner negligent for allowing a dangerous accumulation of oil on the vessel's deck while at the same time finding the vessel seaworthy.

A similar argument was made years ago in *Malm vs. United States Lines Co.*, 269 F.Supp. 731 (S.D.N.Y. 1967),

affirmed 378 F.2d 941 (2d Cir. 1967). Judge Weinfeld's response then is pertinent to consider here:

> The fact that the jury found against the plaintiff on the unseaworthiness claim does not invalidate its verdict on the negligence claim. Inconsistent jury verdicts upon different counts or claims are not an anamoly in the law, which at times recognizes a jury's right to an idiosyncratic position, provided the challenged verdict is based upon the evidence and the law.

The Fifth Circuit in *Griffin vs. Matherne,* 471 F.2d 911 (5th Cir. 1973) has taken a similar view with respect to such alleged inconsistencies in jury verdicts holding that:

> The seventh amendment requires that if there is a view of the case which makes the jury's answers consistent, the Court must adopt that view and enter judgment accordingly.

Here, the Jury's answers are consistent with the instruction on the law they were given. For the Court made clear in its charge that the plaintiff's claims based upon the Jones Act and the General Maritime Law, respectively, represented distinct and separate theories of recovery with distinctly different meanings. Unlike the instructions given by the trial court in *Bernardini vs. Rederi A/B Saturnus,* 512 F.2d 660 (2d Cir. 1975), the Court here emphasized to the jury that the plaintiff's theories of recovery were to be considered independently of each other and that the plaintiff could recover *either* for negligence or unseaworthiness. In this regard, Judge Mentz charged the jury as follows:

> Where more than one claim is involved, as in this case, you should consider each claim, and the evidence pertaining to it, separately, as you would had each claim been tried separately before you; but in

> determining any fact in issue you may consider the testimony of all of the witnesses, regardless of who may have called them, and all the exhibits received in evidence regardless of who may have produced them.
>
> If a preponderance of the evidence does not support each essential element of a claim, then the jury should find against the party having the burden of proof as to that claim. . .
>
> You should also remember that the plaintiff has asserted two separate claims. The first is for negligence under the Jones Act. The second is for unseaworthiness. The plaintiff may be entitled to recover damages provided he can establish *either* of his claims.
>
> So, if the evidence proves negligence *or* unseaworthness on the part of the defendant, which was a legal cause of damage to the plaintiff, you should award plaintiff an amount of money that will fairly and adequately compensate him for such damage, including any damage the plaintiff is reasonably certain to experience in the future.[1]
>
> (Emphasis added). (Transcript, pp. 296, 303)

The Court then defined and distinguished the two theories of recovery.

As to the Jones Act cause of action, the Court stated that "negligence on the part of the employer is a prerequisite to recovery under the Jones Act. . . . Negligence is the failure to use *reasonable care.*" (Transcript pp. 297, 298).

With respect to the plaintiff's claim under the General Maritime Law, the Court told the jury that the plaintiff had to prove that the vessel was unseaworthy

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[1] It is important to note that Judge Mentz's charge is a verbatim quotation of the Pattern Fifth Circuit Jury Charges.

and that a "claim of unseaworthiness is a claim that the owner of a vessel has not fulfilled his legal duty to members of the crew to provide a vessel *reasonably fit for its intended purpose*". (Emphasis added). (Transcript, p. 300).

Nowhere did Judge Mentz instruct the jury that under the circumstances of this case "reasonable care" on the part of the defendants meant exactly the same thing as a "reasonably fit" vessel. But this is precisely what the defendants now claim is true. If this was the defendants' position, it was clearly encumbent upon them under our rules to make a proper objection to the charge as formulated by Judge Mentz. Rule 51 of the Federal Rules of Civil Procedure.

The jury's answers on unseaworthiness and negligence are *different*; but they are not irreconcilable. The jury could have concluded from the proof that although the defendant did not exercise ordinary care in allowing the deck to be made slippery by an accumulation of oil on the deck, the accumulation did not make the vessel unseaworthy. There was testimony that the deck's safety had been enhanced by non-skid paint, and it is reasonable to conclude from its verdict on the unseaworthiness count that the jury believed the defendant's proof in this regard. See *Kokesh v. American Steamship Co.*, 747 F.2d 1092 (6th Cir. 1984).

Alternatively, the jury could well have felt that it could not find that the vessel was "unseaworthy" since the plaintiff had been unable to produce any specific evidence as to the exact cause of the presence of oil on the deck. Since the plaintiff had not proven that the oil had accumulated because of a *defect* in the ship's gear, the

jury may well have thought that the plaintiff had not met its burden of proof on this issue.

In a very similar situation as presented here, the Fifth Circuit in *Miller vs. Royal Netherlands Steamship Company,* 508 F.2d 1103 (5th Cir. 1975) refused to set aside a jury's verdict which reached different conclusions with respect to negligence and unseaworthiness reasoning as follows:

> The District Court's lengthy instructions contained an explanation of the difference between negligence and unseaworthiness and cautioned the Jury that if they found both negligence and unseaworthiness, the Plaintiff could still recover only for one. Reason confirms that the Jury could have found negligence on the part of the ship owner in creating and failing to correct the list (since it was a finding that the evidence clearly would permit) but, mindful of the Court's instruction, simply did not pause to further consider whether the list also constituted an unseaworthy condition. In view of the mass of evidence and copious judicial instructions which this Jury faced, such a failure to appreciate the need to apply this legal concept is not only plausible but understandable. Indeed, considering that the Jury's function under Rule 49(a) is solely one of fact finding, a jury which had made a finding that the listing of the ship constituted negligence on the part of the ship owner, would not be bound to apply the legal consequences of such a finding, i.e., that negligence causing instability necessarily constituted an unseaworthy condition of the ship. This could be done by the Court. Since this logical and probable rationalization of the Jury's answers exists, the verdict must be accepted. Even though equally persuasive possibilities that would produce reversal might be shown to exist, our inquiry ends here.

Since there are several ways to explain and reconcile the Jury's decisions with respect to negligence and unseaworthiness, its verdict should not be disturbed. *Griffin vs. Matherne, supra, Miller vs. Royal Netherlands Steamship Company, supra.*

CONCLUSION

For the reasons stated the defendant's Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

THE COURT: Ms. Lambert, will you give each member of the jury a copy of these instructions.

(Whereupon the jury was handed a copy of the instructions.)

THE COURT: Ladies and gentlemen: These are your jury instructions. You won't be able to take them into the jury room. But I will ask you to follow along with me as I read the instructions to you.

Members of the jury, now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case. It is your duties as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law as stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed

by prejudice, or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through natural persons as it's agents or employees, and in general, any agents or employee of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his authority, delegated to him by the corporation or within the scope of his duties as an employee of the corporation.

As stated earlier, it is your duty to determine the facts and in so doing you must consider only the evidence I have admitted into the case. The term evidence includes the sworn testimony of the witnesses and the exhibits admitted into the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case.

And in so doing to call to your attention certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also during the course of the trial, I occasionally make comments to the lawyers or ask questions of a witness or admonish a witness concerning the manner in which he should respond to the questions of counsel. Do not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense leads you to draw from the facts which have been established by the testimony and evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or believability of each witness and the weight to be given to his testimony. In weighing the testimony of a witness, you should consider his relationship to the plaintiff or to the defendant, his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or

acquire knowledge concerning the facts about which he testified; his candor, his fairness, and intelligence; and to the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of the witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness maybe discredited or impeached by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The rules of evidence provides if scientific or technical or other specialized knowledge might assist the jury in understanding the evidence, or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may

think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

In a civil action such as this, each party asserting a claim, as hereafter described, has the burden of proving every essential element of his claim by a preponderance of the evidence.

A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a preponderance of the evidence merely means to prove that the claim is more likely so than not so.

Where more than one claim is involved, as in this case, you should consider each claim, and the evidence pertaining to it separately as you would had each claim been tried separately before you; but in determining any fact in issue, you may consider the testimony of all the witnesses, regardless of who may have called them and all the exhibits received in evidence, regardless of who may have produced them.

If a preponderance of the evidence does not support each essential element of a claim, then the jury should find against the party having the burden of proof as to that claim.

Plaintiff's first claim is asserted under the Jones Act. The Jones Act is a federal statute which provides

a remedy to any seaman who suffers personal injuries in the course of his employment due to the negligence of his employer or the employer's officers, agents, or other employees. The right of action afforded by the Jones Act is available only to a member of a crew of a vessel in navigation.

This statute did not make the employer the accident insuror of the seaman, however, an negligence on the part of the employer is a prerequisite to recovery under the Jones Act. Specifically, plaintiff alleges that the defendant was negligent because we allowed oil to accumulate on the deck of the M/V Overseas Ohio, thereby creating a slippery condition in an area where the crew normally walked.

So, in order to prevail on his claim under the Jones Act, the plaintiff must establish each of the following elements by a preponderance of the evidence:

First, that at the time of his injury the plaintiff was acting in the course of his employment as a member of the crew of a vessel in navigation.

This element is stipulated by the parties.

Second, that the defendant was negligent as claimed.

Third, that such negligence was a legal cause of damage sustained by the plaintiff.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

For purposes of this action, negligence is a legal cause of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence in this case that any negligence of the defendant contributed in any way toward the injury or damages suffered by the plaintiff, you may find that such injury or damage was legally caused by the defendant's omission.

Negligence maybe a legal cause of damage, even though it operates in combination with the act of another, some natural cause or some other cause, if such cause occurs at the same time as the negligence, and if the negligence played any part, no matter how small, in causing such damage.

If a preponderance of the evidence does not support the plaintiff's Jones Act claim for negligence, then your verdict should be for the defendant. If, however, a preponderance of the evidence does support the plaintiff's claim, you will then consider the defense raised by the defendant.

THE DEFENDANT CONTENDS:

First, that there was no accident; or

Second, that the plaintiff was negligent and that such negligence was the sole or a contributing legal cause of the plaintiff's damage.

These are defensive claims and the burden of proving either claim by a preponderance of the evidence is upon the defendant.

A person working aboard a vessel is charged with the responsibility of looking and seeing where he works.

All persons are required to exercise ordinary and reasonable care for their own safety. If you find that the plaintiff was injured because he failed to exercise ordinary care, then plaintiff is not entitled to recover from defendant for that portion of his damages attributable to his own negligence.

If you find in favor of the defendant on this defense, that will not necessarily prevent recovery by the plaintiff. It only reduces the amounts of the plaintiff's recovery. In other words, if you find that the accident was due partly to the plaintiff, then his own negligence was, for example, ten percent responsible for his own damage, then you would fill in that percentage as your finding on the special verdict form I will explain in a moment. Such a finding would not prevent the plaintiff from recovery. The court will merely reduce the plaintiff's total damages by the percentage that you insert. Of course, by using the number ten percent as an example, I do not mean to suggest to you any specific figure at all. If you find that the plaintiff was negligent, you might find one percent or 100 percent.

Plaintiff's second claim is for unseaworthiness. Specifically the plaintiff alleges that the vessel was unseaworthy because there was oil on the deck of the vessel. So in order to prevail on his unseaworthiness claim, the plaintiff must establish each of the following elements by a preponderance of the evidence:

First, that the vessel was unseaworthy, as claimed.

Second, that the unseaworthy condition was a legal cause of damage to the plaintiff.

A claim of unseaworthiness is a claim that the owner of a vessel has not fulfilled his legal duty to members of the crew to provide a vessel reasonably fit for it's intended purpose.

The duty to provide a seaworthy ship extends not only to the vessel itself, but to all it's parts, equipment and gear, and also includes the responsibility of assigning an adequate crew.

The owner's duty under the law to provide a seaworthy ship is absolute. The owner may not delegate the duty to anyone. If he does not provide a seaworthy vessel, then no amount of due care or prudence excuses him, whether he knew or could have known of the deficiency.

If, therefore, you find that the vessel was in any manner unsafe or unfit, and that such condition was a legal cause of the damage to the plaintiff, then you may find that the vessel was unseaworthy and the ship owner liable without any reference to the issues of negligence of the defendant or any of it's employees.

The owner of the vessel is not required, however, to furnish an accident-free ship. The vessel is not called on to have the best of appliances and equipment, or the finest of crews, but only such gear as is reasonably proper and suitable for it's intended use and a crew that is reasonably competent and adequate.

Unlike the Jones Act claim with respect to which the plaintiff may recover if the alleged negligence is proved to be a slight cause of the injury sustained, in order to recover on a claim of unseaworthiness, it must be proved that the unseaworthy condition was a substantial cause of the injury complained of.

Thus, an unseaworthy condition is a legal cause of damage only if it directly and in natural and continuous sequence produces or contributes substantially to producing such damage, so it can reasonably be said that except for the unseaworthy condition, the loss, injury or damage would not have occurred.

Even so, unseaworthiness maybe a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause, if such other cause occurs at the same time as the unseaworthiness and if the unseaworthiness contributes substantially to producing such damage.

Similar to the response it made to plaintiff's first claim, the defendant denies that any unseaworthiness existed at the time of the accident, and alternatively, states that if the vessel was unseaworthy, then the unseaworthiness did not cause any damage or injury to the plaintiff. The defendant further alleges that some contributory negligence on the part of the plaintiff himself was a cause of any injuries he may have sustained. Since I have already explained to you the meaning and effect of a finding of contributory negligence on the part of the plaintiff, I will not do so again, except to remind you that the defendant has the burden of establishing this defense by a preponderance of the evidence.

You should also remember that the plaintiff has asserted two separate claims. The first is for negligence under the Jones Act. The second is for unseaworthiness. The plaintiff maybe entitled to recover damages provided he can establish either of his claims.

So if the evidence proves negligence or unseaworthiness on the part of the defendant which was a legal cause

of damage to the plaintiff, you should award the plaintiff an amount of money that will fairly and adequately compensate him for such damage, including any damage the plaintiff is reasonably certain to experience in the future.

In considering the issue of plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the plaintiff's damages, no more or no less, damages are not allowed as a punishment and cannot be imposed or increased to penalize the defendant. Neither can damages be based on speculation, because it is only actual damages, what the law calls compensatory damages, that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money. They cover both the mental and physical aspects of injury, tangible and intangible. They are an attempt to restore the plaintiff. That is, to make him whole or as he was immediately prior to his injuries.

You should consider the following elements of damage to the extent you find them proved by a preponderance of the evidence and no others.

Any bodily injury sustained by the plaintiff and any resulting pain and suffering, disability, mental anguish and loss of capacity for enjoyment of life experienced in the past or to be experienced in the future. No evidence of the value of such intangible thing as mental or physical pain and suffering has been or needs be intro-

duced. In that respect, it is not value you are trying to determine, but an amount that will fairly compensate the plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in the light of the evidence.

Any loss of ability to earn money sustained in the past and any such loss in the future.

In determining the reasonably certain work-life expectancy of the plaintiff, the jury should consider, in addition to the evidence received on work-life expectancy, all other facts and circumstances in evidence in the case bearing upon the work-life expectancy of the plaintiff, including his occupation, habits, past health record and present state of health.

I think it is fair to say, Mr. Kullman, in this case, evidence of the work-life expectancy was not introduced because you had, you were asking for five years, is that correct?

MR. KULLMAN: Yes.

THE COURT: In many cases the United States Department of Commerce has all of these figures and the attorneys simply introduce the little booklet.

All right. Continuing on the next page.

If the jury should find that the evidence establishes a reasonable likelihood of a loss of future earnings, then

it becomes the duty of the jury to ascertain the present worth in dollars of such future damages, since an award of future damages necessarily requires a payment be made now for a loss that will not actually be sustained until some future date.

In computing plaintiff's future loss of earning capacity, you may consider individual factors, such as promotions, merit or senority raises that plaintiff would have received during the course of his work life to the extent that you found such increases supported by a preponderance of the evidence.

Under these circumstances, the result is that the plaintiff will, in effect, be reimbursed in advance of the loss, and will have the use of money which he will not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use, interest free of money representing a lump-sum payment of anticipated future loss, the law requires that the jury discount or reduce to it's present worth the amount of the anticipated future loss by taking, first, the REA or below market interest rate or return which the plaintiff could reasonably be expected to receive on an investment of the lump sum payment, together with, two, the period of time over which the future loss is reasonably certain to be sustained. And then reduce or in effect deduct from the total amount of anticipated future loss, whatever the amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time, and include in the verdict an award only for the present worth the total amount of anticipated future loss. The real or below market inter-

est rate is the after tax return on a risk-free investment offset by the estimated rate of general future price inflation. Many economists believe that the appropriate discount factor is between one percent to three percent per year.

Bear in mind that your duty to discount to the present value applies to loss of future earnings.

If you should find that the plaintiff is entitled to damages for future pain and suffering or future mental anguish, then such award is not subject to any reduction to present use.

You are instructed that aany person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to mitigate those damages. That is, to take advantage of any reasonable opportunity he may have had under the circumstances to refuse or minimize the loss of damage.

So if you should find from a prepondence of the evidence that the plaintiff within the limitations of any disability he may have sustained failed to seek out or take advantage of a business or employment opportunity that was reasonably available to him under all the circumstances shown by the evidence, then you should reduce the amount of his damages by the amount he could have reasonably realized if he had taken advantage of such opportunity.

Of course, the fact that I have given you instructions concerning the issue of plaintiff's damages should not be interpreted in anyway as an indication that I believe the plaintiff should or should not prevail in this case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous. It is your duty as jurors to consult with one another and deliberate with a view to reaching an agreement, if you can do so without violating your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion, if it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times, you are not part partisans. You are judges, judges of the facts, your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room, you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. A form of verdict has been prepared for your convenience.

Ladies and gentlemen, I will give the verdict to the marshall, but this verdict is in the form of questions and answers. It's an interrogatory-type verdict, and as we mentioned in the instructions, you have got a Jones Act claim and unseaworthiness and contributory negligence claim. So your first interrogatory is to the effect: was the . . .